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## PROCEEDINGS FOLLOWING CONVICTION.

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The observations which I am privileged to submit to this annual meeting of the American Institute of Criminal Law and Criminology, and to the Wisconsin Branch of that organization, will be directed mainly to facts and conditions regarding the product of the Criminal Courts, and their proper management and disposition.

Whatever information has been gathered is the result of experience in the practical field, and the writer undertakes to avoid the statement of alleged facts not probably established, or the expression of opinions not properly fortified.

The official experience referred to has been confined to one of the northwestern states, but the evidence indicates that, in large measure, the conditions there existing, are general over a considerable scope of territory, and not wholly unknown in any part of the Union. Where civilization exists, there are rules of action, and where there are regulations and men, some of the men will sometimes violate some of the regulations. Therefore, there are jails, courts and prisons, and now probation and parole officers. All these should be adapted to dealing with the men who have been disobedient, and who are adjudged to require correction or detention.

In these days of liberty of conscience and freedom of speech, it may safely be said that crime is folly, and that it is not the outgrowth of conscientious consideration by rational and well-disposed persons. Those whose acts are most tinged with folly are usually the most foolish. The contest against crime is met by unorganized and largely unorganizable forces, which are more marked by incompetency, degeneracy and regardlessness, than by aggressiveness. Crime is committed by men who are descending, not by those who are rising.

Felons in confinement are mostly unskilled in industrial handicraft, or in any other substantial or useful occupation. They grade low in the school of letters. Their moral principles are largely unreinforced by moral instruction, and are dim and insecure. Their religious affiliations have been severed, or were non-existent. They are untidy in dress and demeanor, unfamiliar with, or unobservant of the amenities of life, improvident, undisciplined, superficial, ungrateful, selfish, and coarse. All along the line there are exceptions. This paper is not designed to

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deal largely with exceptions. Many men who are not convicts are likewise faulty, and might be considered simply rather as low grade citizens. They are without means, do not value or carry letters of recommendation, and cannot honestly show prior good character and record.

In the courts where charges were preferred against them, none of these things were presumed, but rather the contrary. They were protected beyond their worth by presumption and exemption, which caused the release of many other men, no more guiltless than themselves, and they know it. They have a higher appreciation of the maxim that it is better that ninety-nine guilty men should escape, than that one innocent man should suffer, than they have of the fact that if ninety-nine guilty men do escape, more than one innocent man will suffer. Their home ties are largely broken, by death or otherwise, and they insist strongly on what they believe to be their rights, while disregarding the rights of others. Their oblique conduct, or the prospect of it, might have been early forecast by one familiar with them. Tests which are now coming into fairly common use among advanced penologists, indicate that many convicts, through retarded development or congenital deficiency, are children in mentality, and must so remain to the end. Satisfactory tests of moral equipment and tendency will no doubt ultimately come into practical utility. This field now invites the student.

On the other side of the picture it may be said that many felons are cheerful and obliging, with good intentions, and a desire to improve. Some of them are industrious when at work under favorable and respected direction. Some, when sober, are good men in almost every regard, and others are pleasing and likeable when not angry or irritated. Fidelity may be found among them to an unexpected degree, particularly fidelity to the person, and so many others of the higher virtues, as well as the commendable traits that dignify men above their average fellows. This is particularly true of men who commit assaults upon other men. Some of them are so much like persons we know and esteem, that the court record discloses almost the only difference. This is written to indicate that the only classification to which convicts can be properly assigned, must be based on their understood individuality, and there must be numerous classes, or none at all. Let there be none.

The men with whom we deal have been arrested on the complaint of some person who has felt aggrieved by their conduct, and against whom they themselves often feel a grievance, or more rarely, upon the initiative of a peace officer. The latter is much better in its effect. They have been confined, idle, without opportunity for physical exercise

even, in an unfit jail, for perhaps a length of time sufficient to debilitate them, and with associations that tend to demoralize. They have seen the prosecuting attorney in court, not as a friend, nor as one having an interest in their future, as is the case in juvenile courts with the youth unrepresented by counsel, but, to them, apparently hostile to what they deem to be their best interest. In some instances, they have believed the question of their disposition to result in a contest between rival members of the bar contending for public approval and reputation, and they experience little gratitude for the efforts of their own attorney, and small respect for any lawyers. They are much displeased and disappointed when their counsel loses on a technical defense, and wish to argue the matter with all comers.

Discountenanced, whipped, and without courage, but more or less desperate in soul, they pass before the court for sentence. The judge is a stranger to them, but no more than that they are strange and strangers to him. They have been proven to have committed a certain act at a certain place, on one of the hours of one of the ten thousand days of their lives. That is all that is necessary. Often that is all that is shown or known. Each man of them has given a name, but names are easy to give. I venture to say that, in some cases, if two prisoners should exchange names at the right time, and insist upon it, they might easily exchange sentences and imprisonment, so little is sometimes known of their identity; and the criminal population seems to come more and more from the vagrants. Possibly it is more accurate to say that criminals are more and more inclined to travel, with the improvement in means for transportation. The prisoner's statement can be taken by the court, if the prisoner feels disposed to make it. The word of a convicted and unknown man is not very good when he comes before the court for sentence. If he makes a statement he is not likely to color the facts to his own disadvantage, and the court, having no opportunity for verifying the truth nor for establishing the falsity of what he says, must judge him more by the manner of his speech, than by its substance. This is often the condition of things when the judge approaches his unscientific duty.

He is about to sentence for a fixed length of time, to an institution with which he may be unfamiliar, a man whom he does not know, and upon whom the effect of the prison regime cannot be told in advance. The sentence is imposed "as punishment for the crime of which he stands convicted," and is to "hard labor." Though many judges may take the opportunity to counsel the defendant at this time, it is not a

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part of the formal requirements to hold out to him that society has any interest in him, except to cause him to suffer for what he has done, and it is the understanding that his labor shall be hard, whatever the quality of his food and bed may be, or his condition of health and strength.

The prisoner goes from the court feeling that he has left no friends behind, and need not expect to meet any when he is registered in, and numbered at the prison. He thinks his conviction a greater misfor-

<sup>1</sup>Annual address at the fourth yearly meeting of the Institute at Milwaukee, August 29, 1912.

tune to him than his criminality, and his friends, if he has any, and the public at large, seem to feel the same way.

The good and learned man upon the bench half consciously feels that this is the part of his work which is unskillful, and that he likes it the least. But as it is a part of his work, and is required by law to be performed, he, as a faithful servant, performs it, as his predecessors in office did before him, as well as he can, and hopes for the best, and experiences a sense of relief when he turns to the civil calendar.

I am sure that there are many men in this presence who have sat upon the bench and pronounced sentences, who would have been glad to have told the unfortunates, that, for their correction and welfare, as well as for the interests of society, they would be committed to the custody of a commission of experienced and thoughtful men, who would so order the matter that such necessary detention as they were to undergo, would be in the place or places best suited to their needs and capabilities, where they would have ample opportunity to improve themselves in every proper regard, and every incentive to avail themselves of their opportunity; and that as soon as, and not before, they should make an affirmative showing entitling them to partial liberty on parole, they should have it, and go out to honorable employment.

If there is a trial judge or ex-judge in attendance upon these sessions, who feels satisfied with the procedure under which he has acted prior to the coming in of the indeterminate sentence law, it is my hope that he will not fail to express himself to that effect at an opportune time before we return to our homes. This is not a challenge, but a request. Heretofore in distinguished assemblages, but perhaps in none so distinguished as this, no apologist has declared himself for the substitute procedure already referred to though many have questioned its wisdom or feasibility.

At the organization meeting of this institute at Chicago, I had the honor of presenting for consideration a theme embracing a method of procedure which I now submit, but more fully, to your consideration.

The judges and lawyers are experts in determining an accomplished fact. No other persons are equally skillful in that regard. The work therefore of determining whether or not an unlawful act, involving serious moral turpitude, has been committed, and, if so, by whom, must necessarily be left to the courts, and the court's officers, as it always has been. When the commission of the wrong, and the identity of the wrongdoer have been established, nothing should remain for the court to do but to commit the defendant to the custody of a commission charged with the responsibility for his care and custody until his final release from the jurisdiction of the state.

One exception should be here noted, based on the fact that imprisonment is an artificial and abnormal condition, and that, *per se*, it is not good; it should be resorted to and justified only when necessary and to be preferred to the continued liberty of the delinquent.

Therefore, when an application is made for probationary liberty, before commitment, the court should hear and cautiously determine the matter, but, when a determination has been reached adverse to the applicant, the work of the judiciary should be closed with the passing of the defendant into the custody of the commission.

Under this system the defense of insanity would not be heard in court, nor the fact of mental irresponsibility. Such matters would be quite immaterial at the trial, and would be considered at a later date by public servants, charged with a peculiar and continuing duty and responsibility in that connection, and equipped with all facilities for deliberately determining the subject's condition. The fact that the crime had been committed by him, and that it was necessary to the interests of the public that he be restrained of his liberty, to the end that he could not repeat his wrongs, would be as far as the court would go with him. Whether a man is dangerous because he is insane, or intoxicated, or whether, being sane and sober, he is dangerous because he is vicious, makes him an equally undesirable man to be at liberty, and equally calls for his restraint; the only difference being in the place to which he should be committed, and the treatment that should be given him.

The penal institutions should be for the care and treatment of acute cases only, while a custodial asylum should be for the chronic offenders, who have demonstrated their incapacity or viciousness, or their corrupting influence, and for those in whose future no prospect of good citizenship can be discerned. That there are many such persons every warden knows. Commitment to the custodial asylum would not be tantamount to life imprisonment, but it would continue until such time

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as a change might come, when a transfer might be ordered, or liberty within severe or easy limitations, or even an absolute release, might be determined to be best.

This part of the work can be better performed by the commission than by the court, for the court must act promptly, and on limited data, and in the way of prophecy, while the commission would place the person under observation and examination, and dispose of him as seemed best, having full power to transfer him from one institution to another, as his changing condition, or the judgment of the commission, might indicate to be proper.

This plan, at its best, would do away with minimum and maximum terms of imprisonment or treatment, and would mean the application of good sense in dealing with the anti-social and non-social. Then no person would be kept in detention unless a good purpose would be served thereby, and no person, properly imprisoned, would be released except for reasons which would appeal to the minds of well informed men; for it will be understood that the commission would be made up of the best available men, and that they should devote their entire time to their official duties.

To be properly equipped for service the state should provide a receiving station, to which would be taken all convicted felons, who are not placed on probation (and many misdemeanants also), in the care of officers appointed by the commission. Many persons thus received could be assigned, without much doubt or delay, to the prison, the reformatory, the school for feeble-minded, the industrial or training school, the state farm for inebriates, the colony for epileptics, the hospital for the acute insane, or to the state custodial asylum; an institution which every state should have, and which should, in time, have a larger population than both the prison and the reformatory.

Recidivists in misdemeanors should be decreed to be felons, and should be saved, as far as possible, from the consequences which follow their weaknesses. No more would we then read, in the report of a county workhouse, that over three hundred persons had each served more than fifty terms therein. As no sane or competent person will serve repeated terms in a workhouse or jail, repeated convictions should be accepted as strong evidence of helplessness, and conclusive evidence that the person needs attention and aid.

Border line cases between badness and madness, or between weakness and viciousness, could be longer detained at the receiving station, for observation sufficient to prevent serious misfits at any of the other

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state institutions, but the more extended work of observation and inquiry should be continued in each case after the delinquent has been assigned to one of the special state institutions.

A normal person, who is convicted of crime and who refuses to establish his identity after he has had time to learn that the authorities wish to serve as his friend, is invariably one whose record has not been clear, and will not bring him credit. Such a person is entitled to no special favor. With the removal of the maximum term, and the substitution of the so-called indefinite term, and with a firm stand against any parole to unknown persons, he would make the necessary disclosures, unless he feared a transfer to a jurisdiction where his status would be still more unpleasant.

With the maximum term of five years, hardly one per cent of reformatory inmates will now hold their secret, if proper means are taken deservedly to win their confidence.

When identity has been established, and the life history, more or less truthful, has been entered in the record, a basis has been laid upon which to build the full story. Repeated interviews will, in some cases, be necessary, and much correspondence must ensue, and perhaps some visits must be made, but, in the end, the man will be known to the authorities, for while this work has been going on, the institution physician, psychologist, teacher, chaplain and keeper have been getting acquainted with him in their several capacities, and submitting helpful reports from time to time. The commission will make mistakes in their original assignments, but these can be readily corrected by a transfer. Men in one institution will advance or retrograde, so that they may more properly be placed in another, but this fact would not constitute a problem, as it now does in so many states.

As one who has spent more than twelve years in direct dealing with delinquents (an exhausting work from which he expects soon to retire), and who has learned the backwardness of the art of penology, and who has some appreciation of the miseries of the wrong-doer, and of the rights of society, I freely declare that the result of my observation and reflection, as an officer of the court, and as a warden, is, that some system akin to what is outlined above, is the only thing that seems to me to promise well in the matter of terminating the active career of the professional criminal, discouraging the coming of foreign criminals, properly disposing of recidivists, paranoiacs and other corrupting and menacing incompetents, and doing justice, and giving necessary aid and encouragement to those who appear to carry a credit of virtue or merit above what may be charged against them.



## DISCUSSION

It has been urged that this plan is revolutionary, and that its adoption and enforcement will meet with constitutional obstacles. Let it be admitted that it is revolutionary, but at the same time, let it be proclaimed that the present system is not a success and that we are looking for better things.

When constitutional questions arise they must be dealt with in the different jurisdictions. They are not for discussion to-day. In some states they may be readily overcome, and in other states more pains and patience will be required. Movements of this kind are not quickly brought to a consummation.

Another objection is that the judges have been men of such quality that the people repose singular trust in the integrity and ability of the courts, and would not be content to have the powers of a commission exercised by others than judges.

This difficulty, which may be more apparent than real, could be met by a provision that the members of the commission, or some of them, should be appointed from the judicial officers, with a salary which, together with the importance of their new work, would make the service attractive to those whose humanitarianism is peculiarly controlling.

As a matter of fact, the proposed plan, to some extent, is now in operation, though the commission may bear a name not clearly indicating its duty and authority, and though it operates under needless and awkward limitations, and is generally made up of men who are charged with too much other work to permit them to give the personal attention and service to their wards that would accomplish the most good.

These are the days and this is the organization in and by which improvement and progress should come, but if we allow ourselves to be diverted from the open path, another generation may come and go before the necessarily hard and discredited methods of our grandfathers' time shall cease to impose needless loss of men and substance upon the state.

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Mr. Randall's address was opened for discussion. Mr. C. W. Bowron spoke of the heterogeneous population of defective, insane, epileptic, weak-minded, and vicious, together with the accidental criminal, the boy without a home, without a father, without a mother, without any of those agencies and influences about him that give him any foothold or any moral standing even in the community in which he lives—who go into our prisons. They seethe in ignorance and vice.

"Consider the position of these defectives that come along to us 23, and 24, and 25 years of age, with the mentality of a child of eight or ten, who must be dealt with along with others in our prisons. Mr. Randall has pictured

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these conditions to you in his paper and has made tentative suggestions that you ought to think about. What can a trial judge know about the antecedents and the hereditary proclivities of any man before him? Your very rules of evidence cut out from you and from the jury and from everybody, everything about that man's previous life history. He stands there perhaps charged with or convicted of one single thing. You know nothing about the hundreds of other things connected with his history. You know nothing about his home life; you know nothing about the brutality of his parents; you do not know what that child has had to bear with from the cradle to the court. You sentence him without any knowledge whatever of his condition mentally, physically or morally, just to preserve a court's 'prerogative.' \* \* \*

"The address we have listened to from the chief justice of Wisconsin touches the question of education. Of the victims you send to the reformatory, 25% cannot read or write. You send them there for a year, expecting to teach them to read and write, and to rehabilitate them, in twelve months, notwithstanding that according to your own law they can stay there only eleven months; and according to the parole law they may come out on parole in nine months. Is that logical or scientific?"

Continuing the discussion it was brought out by Judge Carter of Illinois, that it is not the courts that are assuming this responsibility. It is our system of government, and if we are wrong, we ought, by a system of education, by a system of experimentation, if you will, by a system of study, to change this system and put it upon the right basis.

Judge Gemmill of Illinois, said that the trouble is not with the judges who fail to get at the cause of crime in the particular case. They are doing the best they can. The difficulty is with the state and with the penal institution. "We have no institution that is fitted and proper for the average person who is brought into our courts. For instance, Mr. Bowron speaks of those who are mentally weak, of those whose education and environment from childhood up had been such as to give them a criminal trend; of the large number who are sent back to the house of correction or to the penitentiary, or to the workhouse over and over again. We are compelled to do that very thing, because the state has not provided the proper institution to which they may be sent. There is hardly a state in this Union that has provided a proper place to which we can send these weak-minded people. I am not speaking of the insane; I am speaking of this great army of weak-minded who lack stability of character; persons who are simply so weak that they follow along a criminal road. There is no institution to which to send them except the penitentiary, the reform school, or the workhouse. What we need more than anything else is proper institutions—such as have been established throughout England, such as Switzerland has had for many years in Basle and Berne, such as Germany has now in a dozen different places—where these people can be taken care of."

Judge Charles A. De Courcy, of Massachusetts, spoke as follows: "I think today the most important problem that confronts this, and like organizations, is that of suggesting the ideal prison system; it does not exist in this country nor anywhere else; there has been no substantial light thrown on the subject as a whole. I know no more important immediately practical question confronting us than the formulating of the ideal prison system for a commonwealth.

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"We have taken up the matter of criminal procedure through the American Bar Association, and elsewhere, and it is safe to say that in a majority of the states there is little cause for complaint today in the matter of pleadings or generally of the procedure in the criminal court. They have been made simple, as far as we are concerned with the selection, from among those arrested, of the ones who ought not to be committed to prison. The probation system has long gone beyond the experimental stage and today is doing its work effectively and well in a majority of the states of the Union.

"In connection with that, following what Judge Gemmill says, I know of no judge who sits in a criminal court who does not feel it is his duty religiously to follow out and have a personal investigation made as to the surroundings, past history, and possibilities of every individual who comes before him for sentence, before he determines, first, whether that person shall be placed on probation; or if not, to what institution and for how long a time he shall be committed.

"Then begins difficulty. We have gone further than that in some states. We already have eliminated the insane. A man found insane either before trial, or found insane by the jury after trial, or even subsequent to sentence, is sent to a proper institution for the treatment of the insane.

"In some states, and I can speak of one at least, something practical has been done with reference to the feeble-minded. Not only are those known to be feeble-minded sent to an institution where such cases can be properly treated, but now in our prisons generally, under a recent act of the legislature, investigation must be made of every case that suggests feeble-mindedness. Some proper treatment must then be provided in that institution, or in a special institution provided for the care of the feeble-minded. We are making progress in that line.

"But there remains the great broad field of the average criminal, not insane, not feeble-minded. What are you going to do with him?

"I think we can start off with the proposition that any prison that is not designed and equipped to send men out better than they came in has no justification for existence. If you accept that proposition you must classify your criminals. You must provide proper institutions in which you can place the different classes; which have proper equipment, educational facilities, manual training, learning of trades, moral instruction, proper officers and proper discipline, to carry out the purpose with which you started in order that the person selected and properly sent to this particular institution shall have the very best treatment to bring about the result of making him fit to go back to society. Under the plan of the indeterminate sentence you must keep him there, or where he belongs by transfer, until he is fit to go back a self-supporting and respectable member of the community, if he desires so to be. I believe that that problem suggested and somewhat amplified by Mr. Randall is properly stated. I would not agree in all the details with his statement, perhaps, but the general proposition is true; you must have classification in prisons adapted to bring out the desired result in your several classes. Then under a proper provision of supervising parole send them out with sufficient means and proper provision made, so that they will have a fair chance to start in life again and carry out the good resolutions with which they leave the prison.

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"I believe this institution might well take this matter up as the work of one committee for the next year, to formulate something for discussion, so that eventually we may say: 'Here is our idea of what a state ought to provide in the way of institutions for taking charge of those who ought to be committed and deprived of their freedom.'"

Judge Stevens of Wisconsin, Miss Taylor of South Dakota, and Mr. Hall of Colorado, continued the discussion.

It was ordered that the recommendation in Mr. Randall's address be referred to the proper committee to be named later.